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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY EUGENE WALKER, JR.

Defendant and Appellant.

H036557

(Santa Clara County

Super. Ct. No. C1087833)

In this case we are asked to decide if the trial court deprived appellant Jeffrey Walker of his right to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution when it stationed a second uniformed deputy in the courtroom during his testimony.

For reasons that follow, we affirm the judgment.

Facts and Proceedings Below

On October 14, 2010, appellant was charged by information with second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).) The information contained an allegation that prior to the commission of the offense appellant had been convicted of a serious felony, robbery, within the meaning of Penal Code sections 667, subdivision (a) and 1192.7, which was also a violent felony as defined in Penal Code sections 667.5,

subdivision (c) and 1192.7, subdivision (c); and that he had served a prior prison term for the offense within the meaning of Penal Code section 667.5, subdivision (b).

Prosecution Evidence Adduced at Trial

Around 5 p.m. on September 15, 2010, 15-year-old Arnel H., who was a sophomore in high school, had his iPod Touch in his hand as he was walking on Piedmont Avenue. He saw appellant sitting on a seat at a bus stop; appellant was with a girl. Arnel described the girl as Latina with dark hair. Appellant and the girl were laughing. Arnel had passed the bus stop when appellant said " 'hey, hold on.' " Arnel stopped and turned around. As he did so, appellant asked Arnel what he had in his hand. Arnel told him he had an iPod.¹ Appellant said something to the effect of " 'don't worry, I'm not going to steal it' " as he forcefully grabbed the iPod. Appellant put the iPod in the pocket of his pants. Appellant told Arnel, " 'leave me alone and get out of here.' " Arnel grabbed appellant's arm and politely told appellant to give back the iPod. Appellant pushed Arnel away and told him "get out of here." Appellant grabbed Arnel's clothing in the area of his chest. Arnel did the same to appellant. They struggled and fell into a bush; appellant was on top of Arnel. Arnel screamed for help and placed his foot on appellant's chest so appellant could not hit him. Appellant let go of Arnel and started running. Arnel asked the girl that had been with appellant if she knew anything, but she "just didn't say anything."

Arnel started running after appellant. Appellant turned around and punched Arnel hard on the left side of his temple. Appellant ran again but Arnel did not pursue him because a car with someone Arnel knew from school arrived. Arnel got into the car. As he did so he saw appellant running back to the bus stop and get on to a bus.

The car that Arnel was in followed the bus to another stop. In the meantime, Arnel had called his father. They both arrived at the bus stop at the same time. They got

¹ Arnel referred to the device as an iTouch whereas other witnesses referred to it as an iPod. To avoid confusion we will refer to the device as an iPod.

on to the bus and saw appellant sitting in the first row; he was with the girl he had been with earlier.

Arnel's father told the bus driver he needed to speak to someone on the bus. Arnel followed his father on to the bus and pointed to appellant as the person who robbed him. When Arnel's father confronted appellant he denied he had Arnel's iPod; the girl said she did not know appellant.

A surveillance tape from the inside the bus was played for the jury. A transcript of the audio from the tape showed that before Arnel and his father got on to the bus, the girl asked appellant, "What happened?" However, his response was inaudible, but the girl laughed. She asked appellant, "Where we getting off at?" Appellant said, "We're getting off right here (inaudible)." Then, appellant said, "This is for you ok." After the girl said "Huh?" appellant repeated, "This is for you ok." The girl said "What?" and appellant responded "That."

The bus driver called the police. The police searched appellant, but Arnel's father did not see them search the girl. He thought that she had gone by the time the police arrived.

Seventeen-year-old Janet W. testified that in mid-September she called the police because a "kid . . . [was] saying that . . . he got his iPod stolen and was hit in the head." Janet identified Arnel as the person she saw that day. She identified appellant as the person who was standing close to Arnel. Janet was inside her mother's car just leaving the school parking lot. Janet heard appellant say, " 'I didn't steal it.' " Arnel came to the car and asked for help; he was "freaking out." Appellant left and walked toward the bus stop. Arnel got in to the car; Janet, her mother and Arnel followed appellant. Janet saw appellant with a girl who was wearing a red shirt and had long black hair; the girl was at the bus stop. Appellant and the girl got on to the bus together.

Janet and her mother followed the bus and Janet called the police. Arnel wanted to get out of the car and get on to the bus. As soon as the bus stopped the girl got off the

bus and tried to walk away. Janet's mother followed her. Janet saw the police talk to appellant, but not the girl.

Janet's mother testified that while waiting for her daughter on December 15th she saw an altercation. She saw two "children" struggling. One appeared to be Chinese or "Phillipine" and one was "dark." It looked as if one of them was grabbing for something. When her daughter came out of school she got in the car. As she was leaving the parking lot the "Philippine boy" came over and said "He hit my head and he took my iPod away"; the boy asked for help. The boy got in to her car and her daughter called the police. The other boy approached her car and said something to the effect of "It wasn't that way." This boy went to the bus stop. Janet's mother remembered he was with a girl with dark hair and a red shirt and they were talking; when the bus came along, they got on to the bus together. Janet's mother identified a photograph of the girl and identified appellant as the person who was with her.

Janet's mother followed the bus for about a block before it stopped. Janet and Arnel got out of the car and on to the bus. The girl who had been with appellant got off the bus and Janet's mother followed her. By this time Arnel's father had arrived. When Janet's mother caught up with the girl she confronted her, but did not get out of her car. When Janet's mother confronted the girl about giving back the iPod, the girl put on a sweater she had been carrying and walked away. Janet's mother talked to the police and told them what she had seen.

Gurpal Nijjar testified that she was across the street in her car when she witnessed an altercation near the high school. She saw a young Asian man screaming and heard him say that someone had hit him in the head and had stolen his iPod. The Asian male was asking for help and was very upset. The Asian male was yelling at a dark-skinned male who had lunged at him. Nijjar said that it looked as if the dark skinned male was punching the Asian male. As he shouted for help, the Asian male chased the dark-skinned male past Nijjar's car. The dark-skinned male stopped across the street from

Nijjar's car and turned around. The Asian male continued to accuse the dark-skinned male of stealing his iPod and hitting him. The dark-skinned male took an iPod out of his pocket and said, "Fine. You can have it back. I'll give it back to you. Here. Here. Take it." Nijjar could see an iPod in his hand. The dark-skinned male appeared to be really scared.

Nijjar saw a brown car pull up with two women in it. The Asian male ran up to the car and asked the occupants for help saying that the dark-skinned man stole his iPod. She heard the dark-skinned man say, "This is my iPod. I didn't hit him in the head. He hit me in the head." The Asian male got into the car. At this point, Nijjar noticed a female standing by the passenger side door of her car. The dark-skinned male walked up to her. She heard the female ask what had happened and the male mumbled something. The female said, "Don't worry about it. Just give . . . it to me." The dark-skinned male handed her the iPod and they walked away. Nijjar described the female as having dark hair and wearing a red T-shirt with a white shirt over it. The female and the dark-skinned male walked toward the bus stop.

In court, Nijjar identified appellant as the male she had seen with the iPod and identified a photograph of the female she had seen with appellant. Nijjar was completely sure of her identification. When Nijjar gave a statement to the police on the day of the incident appellant was already handcuffed at the bus stop.

Officer Raya testified that he took a recorded statement from Arnel on the day of the incident. Arnel demonstrated to him how appellant grabbed the iPod from him. Arnel had several scratches on his forearms and complained of pain in his right temple. Officer Raya could see some slight swelling above Arnel's right temple. Officer Raya took several photographs of scratches on appellant's arms and hands. Appellant's t-shirt did not have any shoe prints on it, but there was some shrubbery hanging from it.

Officer Raya released appellant's property to appellant's sister. The property included a backpack, baseball cap, cellular telephone and bus pass.

Defense Evidence

Appellant testified in his own defense that on September 15th, 2010, he was walking to the bus stop when he heard some screaming; he saw two African American individuals wearing black clothing run past him. He turned a corner and saw Arnel getting up from the bushes. Appellant said he was about an arm's length away from Arnel when Arnel pointed to appellant and said, "You robbed me." Appellant said that he replied, "Man, you're tripping." Arnel was screaming for help. Appellant described him as hysterical and angry. Appellant saw a woman sitting at the bus stop, but he did not know her name although he had seen her at parties.

Appellant said that he walked away quickly from Arnel, but Arnel followed him still screaming. Arnel was swearing and said that appellant had taken his iPod. Appellant said that he turned around to confront Arnel and tell him he did not know what Arnel was talking about, but he could not get Arnel to listen. He saw a car pull up with two women in it. Appellant testified that had been trying to call for help on his sister's cellular telephone; he walked up to the car. He told the women he had a phone, which looked similar to an iPod. He asked the women if they could get Arnel away from him. Appellant walked away from the car, but Arnel ran after him and grabbed his arm. Appellant turned around and hit Arnel on the side of the head. Appellant said that Arnel went back to the car and he went to the bus stop. Appellant admitted that when Arnel and his father confronted him on the bus he lied to them when he said he did not touch Arnel.

Appellant said that he got on to the bus, as did the woman who had been sitting at the bus stop. He did not see Arnel at this point in time. Appellant was worried that Arnel might call the police and he might face an assault charge so he gave some marijuana he was carrying to the woman on the bus. He thought he would not be caught with it if the police searched him. At the next bus stop, Arnel got on to the bus with his father. Appellant said that when they confronted him about taking the iPod, he said he did not

have it and they could search him. He opened his backpack and showed them his pockets; he gave them his home telephone number. Appellant got off the bus sometime after Arnel and his father got off because the bus driver had said he was not going to go anywhere until the police arrived. Appellant said that while waiting for the police, he tried to talk to Arnel and his father. When the police arrived they handcuffed him and pat searched him. Appellant did not know how he got the scratches on his arms, but he thought it might have been when Arnel grabbed him. Appellant admitted that he had been convicted of a felony involving theft in 2009.

Before appellant testified, defense counsel told the court that appellant had decided to take the witness stand. The court stated that it understood, but an issue had arisen as to how to handle security. Deputy Edward Yearman, a risk assessment deputy who was present in court, told the court the following: "Generally - - in each case we evaluate the security risk that the defendant presents or any other witness might present to the case. When in-custody witnesses, in-custody defendants choose to testify, it has been not just a policy, but, kind of, a review of each case to station deputies in different portions of the courtroom. [¶] When they are on the witness stand, we like to have them adjacent to the defendant or in-custody witness to help provide security. We try not to escort them through in front of a jury or anything like that. We always request the court to take a break. The jury's excused from the courtroom. Defendant or in-custody witness is at the witness stand. When court resumes, the jury comes in, they stand up at the witness stand. Court resumes. When their testimony is finished, again we ask for a short break so that they can be back at the defense table once the jury returns so they don't see any type of escorting [*sic*] or any type of human shackling, as it's been referred to in court cases. [¶] We're not looking for any additional physical restraints when they're testifying. I think that would be prejudicial to the defendant."

The court asked Deputy Yearman what he recommended in this case after talking with the regular courtroom deputy. Deputy Yearman responded, "An additional

uniformed deputy sheriff." The court noted that it was its understanding that the additional deputy would be seated in the corner by the exit door in the front of the courtroom to the side of the witness box, and the regular deputy would remain seated at the regular deputy station. Deputy Yearman confirmed that the court's understanding was correct.

The court asked Deputy Yearman if appellant would be able to take the stand with a deputy already seated or would he have to take the stand before the jury came back in. Deputy Yearman replied, "It would probably be - - we usually have them already seated before the jury comes back, so that the jury doesn't see him moving through the courtroom. That way there's no concerns that the deputy stationed up by the witness stand, it's not as if he's directing the defendant to the stand or anything along those lines." The court asked if Deputy Yearman had any objection to having appellant take the stand as long as the deputy was already seated. Deputy Yearman confirmed that he would not.

The court asked the regular courtroom deputy to mention some "specific issues [she] had with the defendant in terms of following the rules of the Court during the trial." Deputy Catalano noted that defendant "stood up . . . prior to being directed to do so on a break. That could have possibly been a misunderstanding. But after further discussion with him regarding communication with people in the audience, he's been directed not to do that and has still continued to turn around give head movements to say, hello, I believe, to a friend that was in court yesterday . . . as well as a sister of his, Angel, after I had indicated to him not to communicate with people out in the audience. [¶] So there ha[ve] been specific times with me directing him not to do something where he has disregarded the direction."

The court asked defense counsel to comment on the "proposed issue." Defense counsel acknowledged that any time there is a criminal case there are security concerns. However, he told the court that in his experience over the past two decades of trying cases, his clients had walked to the witness stand without being preceded by a deputy.

Defense counsel asked the court if the court were inclined to allow that in this case. The court confirmed that it would; the court stated that appellant would be allowed to "walk up and to be sworn like any other witness to stand in front of the court reporter's desk, be sworn and then take the witness stand."

Defense counsel expressed his appreciation for the court's ruling and continued, "And I also have no objection to the presence of an extra deputy in the courtroom, because I do know that there's an exit door about 6 to 8 feet from where the witness stand is and the court has voiced legitimate concerns regarding that. [¶] The problem I have is that during the trial we've just had one bailiff, one deputy present. And, all of a sudden when my client takes the stand, the jury's going to see the presence of a second uniformed deputy sitting in very close proximity to where he's testifying. And I think that can raise an inference in the jury's mind that Mr. Walker, perhaps, poses a security risk or is [a] flight risk. And, of course, that inference is very prejudicial. [¶] I realize there are cases under California law that gives the court discretion to have extra security when a defendant testifies. But I think there's also federal due process issues about a client's right to a fair trial and we should do everything in our power not to prejudice the defendant." Defense counsel confirmed that appellant had acknowledged his grandmother and his sister and conceded that appellant "was going outside the rules when he turned his head" and told his grandmother that he loved her. However, defense counsel did not think that these incidents suggested that appellant was a flight risk or a security risk that justified having a deputy seated close to him. Defense counsel continued, "I was asking Deputy Yearman if it's possible we might have somebody in civilian clothing. But, apparently, there's no one available. I think that might be a happy medium. But I would object to . . . a uniformed deputy sitting in close proximity to my client, just for the record."

Deputy Yearman told the court that placing a deputy in plain clothes inside the well of the courtroom "might cause more interest from the jury than a uniform officer

who are used to seeing deputies in and throughout the building in and throughout the courtroom, suddenly placing a plainclothes there. [¶] Plainclothes are usually for when we place them elsewhere in the courtroom. It just looks like another citizen or family member sitting in the audience. [¶] Why I dress in plainclothes is to pretty much blend in more with an audience. I usually don't sit inside the well area to provide security or to monitor proceedings."

Deputy Catalano suggested that the second deputy could be in court from the beginning of the court session through the remainder of the day, so it would not seem as if he or she were there just because the defendant was testifying. The court asked if the deputy could be there during closing argument and Deputy Catalano confirmed that he or she could be there.

Thereafter, the court stated that it appreciated defense counsel's argument, but went on to say, "I am going to find, based on the particulars of this case and the particulars of the defendant, including the allegations in this case and the prior conviction of the defendant and the allegation of a prior contact, that it is appropriate in this case to have the additional precaution of having a second uniformed deputy seated in the very corner of the front of the courtroom before we bring in the jury. [¶] And then, as I understand, he can remain there the entire day, including in the afternoon during closings when Mr. Walker is not testifying. [¶] Mr. Walker will be allowed to be called by [defense counsel], to stand up from counsel table and to step forward and to be sworn, as every other witness has been. To stand by the court reporter to be sworn and, then, take the seat in the witness stand unaided. [¶] But the additional security is warranted, not only by the information that has been provided by the defendant's prior history . . . but, in addition, by the fact that there is an exit door that has to remain open for fire reasons at the front of the courtroom. [¶] In addition, the witness box is right next to the court bench. There is only a swinging door that does not cover the whole area between the bench and the witness box. There is a gap and only a swinging door. In light of all that,

it is appropriate to have the additional security. [¶] The fact that the uniform officer will be seated in the corner originally and will be here the full day would be unobtrusive. As the deputy mentioned, we have had deputies coming in and out of the courtroom and have had second deputies at times with Deputy Catalano in the courtroom."

Following a recess, defense counsel called appellant to the stand.

Discussion

Due Process

Appellant contends that the trial court violated his right to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution when it stationed a second uniformed deputy in the courtroom during his testimony.

"A trial court has broad power to maintain courtroom security and orderly proceedings." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269; accord, *People v. Stevens* (2009) 47 Cal.4th 625, 632 (*Stevens*).) On the other hand, "certain security measures may burden the right to a fair trial. In particular, to require the defendant to appear before the jury under physical restraint may impair that right, for example by leading the jury to infer he is a violent person and by tending to dispel the presumption of innocence. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 995 (*Jenkins*).)

Both the United States Supreme Court and the California Supreme Court have distinguished "between security measures, such as shackling, that reflect on defendant's culpability or violent propensities, and other, more neutral precautions." (*Jenkins, supra*, 22 Cal.4th at p. 996, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 567-568 (*Holbrook*);²

² In *Holbrook v. Flynn, supra*, 475 U.S. 560, the high court opted for a case-by-case consideration of whether challenged security measures are so inherently prejudicial as to deny the defendant the constitutional right to a fair trial. The court recognized that jurors' initial reaction at the outset of a trial is not dispositive as the jurors may not be aware of the impact the practice will have on their attitude toward the accused. Therefore, the court must determine only whether the security practice or practices presented an "unacceptable risk" that impermissible factors will come into play. (*Id.* at p. 570.) The court should look "at the scene presented to jurors and determine whether what they saw

see also, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 224 [maintaining distinction between shackling and the deployment of security personnel in the courtroom]; *Stevens*, *supra*, 47 Cal.4th at p. 634 [distinguishing between physical restraints placed on the defendant's person and most other security practices].)

Under high court authority, both federal and state, " 'the use of identifiable security guards in the courtroom during a criminal trial is not inherently prejudicial,' in large part because such a presence is seen by jurors as ordinary and expected and because of the many nonprejudicial inferences to be drawn from the presence of such security personnel." (*Jenkins*, *supra*, 22 Cal.4th at p. 998; see also, e.g., *Stevens*, *supra*, 47 Cal.4th at p. 629 [the stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice].) In *Stevens*, the California Supreme Court observed that "after a nationwide search," it had not found "a single conviction that has been reversed under *Holbrook* based on the presence of excessive security in the courtroom." (*Id.* at p. 635.)

Nevertheless, the *Stevens* court cautioned, "[t]he court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis." (*Stevens*, *supra*, 47 Cal.4th at p. 642.)

Appellant contends that the trial court did not exercise its discretion to determine if factors specific to him required additional security measures. Respectfully, we point out that the record does not support this claim.

As we read the record, the trial court did not defer to a routine or standard security practice without regard to case-specific concerns. Further, the court took great pains to ensure that a procedure could be used that would attract a minimum amount of attention

was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." (*Id.* at p. 572.)

to the extra security—the second deputy would be seated in the courtroom the entire day and not just when appellant testified, and appellant was allowed to walk from counsel table to the witness stand without the deputy escorting him.

Although the court agreed that a uniformed deputy was more appropriate than a plainclothes deputy that does not mean that the court deferred to a sheriff's department policy without making a case specific finding. The courtroom deputy had voiced concerns about appellant's failure to follow the rules, which in essence amounted to a disregard for the courtroom security. The court found that based on the charges appellant faced, his prior history, which involved violence, his prior conviction, which involved violence, and prior contacts, the stationing of a second deputy was called for in a courtroom that had an unlocked exit door close to the witness stand and little between the judge on the bench and appellant while he was testifying.

Notably, in this case, the court was aware that appellant had a prior conviction for robbery and that another count of robbery and one count of burglary were dismissed in the case that led to the robbery conviction.³ In discussing in limine motions, the court was informed of the conduct underlying the case. In one robbery, appellant and two other individuals approached the victim, who was on a bicycle, and blocked his path. Appellant held a knife pointed at the victim and demanded his iPhone. In the other robbery, appellant and another individual approached the victim, who was playing basketball at the time. Appellant asked to see the victim's iPod. When the victim hesitated, appellant quickly opened a knife and brandished it at the victim; appellant told the victim he had five seconds to hand it over or be stabbed. Accordingly, the court was

³ In the event that appellant testified, for impeachment purposes, the prosecution sought to admit the fact of the prior robbery conviction and the conduct underlying that conviction and the dismissed robbery count. Ultimately, the court ruled that although the prosecution could impeach appellant with the fact of a prior conviction for robbery, which the court sanitized to a felony involving theft, the conduct underlying the robbery conviction and the conduct underlying the dismissed count of robbery could not come in under Evidence Code section 1101, subdivision (b).

aware that appellant had a violent past; the court took that information into consideration when making the case specific assessment that extra security was necessary when appellant testified, which the court was entitled to do. (*Stevens, supra*, 47 Cal.4th at p. 643.)

In short, the trial court came to its own conclusion about stationing a second deputy in the front of the courtroom and did not abdicate control to law enforcement. Since trial court decisions regarding courtroom security are reviewed for abuse of discretion and because the exercise of that discretion must be informed by the particular circumstances of a given case (*Stevens, supra*, at pp. 643-644), which the record shows happened in this case, we reject appellant's claim that the court violated his right to due process.

Equal Protection

Alternatively, appellant claims the Sheriff's Department "policy" of requiring additional security measures for in-custody defendants violated his right to equal protection under the law. Respondent argues that because there was no objection below on this ground, no evidence was taken and no findings were made. Thus, respondent contends that the argument is based on an incomplete and inadequate record and this court should treat the claim as forfeited.

Whether a constitutional violation can be asserted for the first time on appeal depends partly on whether the alleged error is primarily legal or factual. When a constitutional claim may readily be resolved as a pure question of law on the basis of undisputed facts and does not depend on the development of new facts, appellate courts will reach the merits and not find the claim forfeited. (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323; *In re Sheena K.* (2007) 40 Cal.4th 875, 880–889.)

"The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in similar fashion." (*People v. Leng* (1999) 71 Cal.App.4th 1, 11.) First, we ask whether the two classes are similarly situated with respect to the purpose of the law in question, but are treated differently. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) If groups are similarly situated but treated differently, the state must then provide a rational justification for the disparity. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200–1201.)

Thus, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*Cooley, supra*, 29 Cal.4th at p. 253.)

Appellant argues that in custody and out of custody defendants are similarly situated, but are treated differently. The problem with appellant's equal protection argument is that it is based on a premise for which there is no support in the record. That is that the Sheriff's department has a policy of stationing a second deputy for in custody testifying defendants and not for out of custody testifying defendants. We point out that appellant's claim that the Sheriff's department treats out of custody defendants differently is based on pure speculation and supposition.

More importantly, as noted *ante*, however, the Sheriff's department cannot employ a routine policy because each case must be evaluated on a case specific basis. (*Stevens, supra*, 47 Cal.4th at p. 642.) Thus, here, the presence of the second deputy in the courtroom was not pursuant to any policy of the Sheriff's department, but was pursuant to the court's determination that because of the charges appellant faced, his prior history, which involved violence, his prior conviction, which involved violence, and prior contacts between appellant and the regular courtroom deputy, increased security was warranted.

In essence, appellant cannot raise an equal protection argument because he was not aggrieved by any "policy" in this case. "One who seeks to raise a constitutional question must show that his rights are affected injuriously by the [policy] which he attacks and that he is actually aggrieved by its operation." (*People v. Black* (1941) 45 Cal.App.2d 87, 96.) The argument advanced in support of the equal protection claim is based entirely upon a hypothetical situation not involved in this case.

Finally, we find that if any error was committed, when viewed under the *Chapman v. California* standard (*Chapman v. California* (1967) 386 U.S. 18, 24) any purported error in stationing the second deputy in the courtroom was harmless beyond a reasonable doubt. (See *People v. Taylor* (1982) 31 Cal.3d 488, 499 [applying the test for federal constitutional error to an in custody defendant who was required to wear jail clothing where there was the possibility of an equal protection violation].)

Contrary to appellant's suggestion, the evidence of appellant's guilt was overwhelming. Given the unanimous eye witness identifications that confirmed Arnel's account of his interactions with appellant, the testimony from Nijjar that she heard the girl from the bus stop ask appellant what had happened and appellant mumbled something and handed her the iPod as they walked away, and the videotape from the bus that showed that appellant did know the girl in the red shirt, appellant's account of the incident stretched the boundaries of credibility.

Since we have addressed appellant's equal protection argument we need not address appellant's contention that he received ineffective assistance of counsel based on counsel's failure to raise an equal protection objection.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.